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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 1.

EDWARD B. DOUGLAS,

Petitioner,

vs.

LEVI M. WILLCUTS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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Supreme Court of the United States

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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS OF THE COURTS BELOW.

The District Court filed no opinion. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 82-87) is reported at 73 F. (2d) 130.

GROUNDS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The judgment (R. 87, 88) of the United States Circuit Court of Appeals was entered on September 13, 1934. A Petition for Rehearing was denied

October 22, 1934 (R. 97). A Petition for a Writ of Certiorari was filed in this Court November 26, 1934. The Petition for Certiorari was denied January 7, 1935, but upon Petition for Rehearing the order denying the Petition for Certiorari was vacated and the Petition for Certiorari was granted April 8, 1935 (R. 89, 90).

QUESTION PRESENTED.

Is the income of property, irrevocably held in a trust established by a settlor pursuant to an agreement, made prior to divorce with his wife, who accepted the benefits of the trust in full settlement of all interest (dower or statutory) in the settlor's property and estate and of all claims against him for maintenance and support, which income is distributable to and is received by the wife, the life beneficiary, income of the settlor?

STATUTES INVOLVED.

The statutes involved are set forth in Appendices A and B.

STATEMENT.

On September 12, 1923, Petitioner, Edward B. Douglas, by a complete and irrevocable assignment in trust (Exs. I and II, R. 7-17) transferred securities of an aggregate par value of Four Hundred Twenty Thousand Dollars ($420,000) to Minneapolis Trust Company as Trustee to pay his wife, Ida M. Douglas, the sum of Fifteen Thousand Dollars ($15,000) each year until November 6, 1927, and thereafter for her life the sum of Twenty-one Thousand Dollars ($21,000) each year (R. 8, 9). It was expressly agreed that Mrs. Douglas would and she did accept this provision in

lieu of and in full settlement of alimony, any and all dower rights and statutory interests in Petitioner's estate, and all claims for maintenance and support (R. 10). It was also agreed that if the income of the property so held in trust at any time should prove insufficient to cover the specified payments to Mrs. Douglas, and Petitioner failed to make good any deficiency after being requested so to do by the Trustee, the Trustee might make up the deficiency by the sale of securities constituting the corpus of the trust (R. 9). It was also agreed that if the income of the trust property exceeded the specified payments to Mrs. Douglas, there being no impairment in the fund and the excess not being required in the judgment of the Trustee to be accumulated to insure the prompt payment of the future amounts payable to Mrs. Douglas, the excess income was to be paid to Petitioner, his heirs, executors, administrators, or assigns (R. 9). On November 10, 1923, Petitioner voluntarily waived the right, originally reserved to him in the trust agreement (R. 9), to designate and determine, subject to the Trustee's approval, the securities in which the trust *res* might be invested (R. 69, 70, 58).

On September 15, 1923, Mrs. Douglas was granted an absolute divorce from Petitioner (R. 70). In its decree the divorce court ordered that Petitioner "provide and create the trust fund as set out in that certain agreement between said parties and the Minneapolis Trust Company as trustee now on file with said trustee, and that the plaintiff have the provision therein made in lieu of all other alimony or interest in the property or estate of the defendant" (R. 55, 70).

The distributable net income for 1927 and 1928 of the trust property, which income was actually distributed to and received by Mrs. Douglas, was $12,610.52 (R. 72, 58) and $17,617.39, respectively (R. 70, 59). Petitioner did not in-

clude these amounts in his gross income upon his income tax returns for the years 1927 and 1928 (R. 74, 71, 72). The Commissioner of Internal Revenue determined that these amounts were income to Petitioner and assessed taxes against him in respect thereto (R. 74, 72). Petitioner paid these taxes under protest (R. 74, 73). In a suit for the refund thereof the District Court gave judgment for Petitioner (R. 64, 65). This judgment was reversed by the Circuit Court of Appeals (R. 87, 88).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in holding

(1) That the income of the property irrevocably assigned by Petitioner and held by the Trustee in trust, which income was distributable and distributed to Ida M. Douglas, the life beneficiary, was taxable to Petitioner, for the reason that that income is taxable either to the fiduciary or to the beneficiary and is not taxable to Petitioner.

(2) That Petitioner was legally obligated to pay alimony to his divorced wife, for the reason that Petitioner and his wife prior to divorce effected a compromise and settlement whereby she elected to assume the position of a beneficiary or a donee.

(3) That the judgment of the District Court should be reversed, for the reason that there is substantial evidence to support that judgment, which fact requires that the judgment be affirmed.

ARGUMENT.

The sole problem before the Court is the ascertainment of the person who is subject to tax, under the provisions of the Revenue Acts of 1926 and 1928, upon the income of the Ida M. Douglas Trust.

I.

THE IDA M. DOUGLAS TRUST IS VALID, BINDING, AND IRREVOCABLE, IS FULLY WITHOUT THE CONTROL OF PETITIONER, AND IS AN ESTABLISHED LEGAL ENTITY.

What was done by the parties and the divorce court:

It is plain and indisputable that Petitioner and his wife, Ida M. Douglas, entered into a formal and valid agreement or property settlement concerning Mrs. Douglas' interest in Petitioner's estate and the income thereof;[1] that under the agreement Petitioner conveyed, assigned, transferred, and set over valuable personal property to an irrevocable trust of which Minneapolis Trust Company was trustee (R. 7-17); that the trustee was authorized to hold the trust *res* in its name, to collect the interest and principal of the securities in the trust, to reinvest the same, to determine without the interference of Petitioner the investment to be made of the trust funds, to sell any part of the trust corpus in order to make good any deficiency in the amount of cash needed for the specified payments to the named beneficiary, to accumulate the income of the trust to insure prompt payments to

[1] Mason's Minnesota Statutes of 1927 provide: Women retain the same legal existence and personality after marriage as before (Sec. 8616); any married woman during coverture may receive and acquire property and the income thereof free from the control of her husband (Sec. 8617); every married woman is bound by her contracts and her property is liable for her debts to the same extent as if she were unmarried; she may make any contract which she could make if she were unmarried and shall be bound thereby (Sec. 8618); in relation to all subjects, other than real estate or any interest therein, husband and wife may contract with each other (Sec. 8621).

the beneficiary, and to pay the income installments to the named beneficiary (R. 9, 69, 70); that by the agreement Mrs. Douglas was named life beneficiary of the trust to the extent of a specified annual income (R. 8, 9).

It is equally plain and indisputable that under the agreement Mrs. Douglas accepted a life interest in the trust *res*, to the extent of the amounts of the annual payments, in lieu of and in full settlement of any and all alimony, claims for separate maintenance and support, and dower rights or statutory interests that she, as Petitioner's wife, might then have or in the future be entitled to in Petitioner's estate (R. 10); that the agreement was in no way conditioned upon the event of a divorce between Petitioner and Mrs. Douglas or upon the possibility of the divorce court's awarding Mrs. Douglas anything from Petitioner's estate or income; that at a time subsequent to the making of the agreement, the creation of the trust, and Petitioner's transfer of property thereto, Mrs. Douglas obtained from Petitioner an absolute divorce (R. 70, 55).

The income of the trust for the calendar years 1927 and 1928 consisted of dividends, interest, and other income (R. 73, 70). It was received by the trustee from the property constituting the fund in its possession and under its control. The income was distributed to Mrs. Douglas, the beneficiary, pursuant to the terms of the agreement (R. 73, 70).

What might have been done by the divorce court:

It is indisputable that, under the provisions of *Mason's Minnesota Statutes of 1927*, Section 8602, (see Appendix B), the divorce court might have awarded to Mrs. Douglas, upon her divorce, such part of the personal and real estate of Petitioner, not exceeding in value one-third thereof, as it deemed just and reasonable, provided Mrs. Douglas' own

estate and property restored or awarded to her were insufficient for her support, and, in addition, *alimony* from Petitioner's earnings and income. This the divorce court did not do. Instead, the effect of its judgment and decree was that Mrs. Douglas' estate and property, then being composed in part of her life estate in the trust *res*, was sufficient for her support and that, under the statute, the court should award to her no alimony or further property.

The legal effect of what was done:

The agreement, of course, was effective to create a trust valid under the laws of the State of Minnesota.[2] The trust was irrevocable.[3] The whole estate in law and in equity was vested in the trustee.[4] The agreement subjected the trustee to the duty of supporting and protecting the trust.[5] It invested Mrs. Douglas with a life estate in the trust fund which is regarded as her separate property. *Walker vs. Walker,* (1869) 9 Wall. 743, 753. That interest, it appears, is alienable.[6] There was left to Petitioner an estate in reversion only.

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[2]Mason's Minnesota Statutes of 1927, Sec. 8090 (5) and (6), see Appendix B; First Trust Company of St. Paul vs. Matheson, (1932) 187 Minn. 468, 246 N. W. 1; Congdon vs. Congdon, (1924) 160 Minn. 343, 200 N. W. 76.

[3]Ewing vs. Warner, (1891) 47 Minn. 446, 50 N. W. 603; see 1 Perry, Trusts and Trustees, (1929, 7th Ed.), Sec. 104.

[4]Mason's Minnesota Statutes of 1927, Sec. 8095, see Appendix B.

[5]Sterling vs. Sterling, (1899) 77 Minn. 12, 14, 79 N. W. 525; Congdon vs. Congdon, (1924) 160 Minn. 343, 376, 200 N. W. 76; see 3 Bogert, Trusts and Trustees, (1935) p. 1726.

[6]See Bunn, Spendthrift Trust in Minnesota, (1934), 18 Minn. Law Rev. 493, 498; see Fraser, Suspension of the Power of Alienation, (1925), 9 Minn. Law Rev. 314, 349; see Note (1931), 15 Minn. Law Rev. 570, 578; see Congdon vs. Congdon, (1924) 160 Minn. 343, 359, 200 N. W. 76, 81; see Simmons vs. Northwestern Trust Company, (1917) 136 Minn. 357, 361, 162 N. W. 450. See Melby vs. Nelson, (1926) 169 Minn. 273, 276, 211 N. W. 465; see 1 Bogert, Trusts and Trustees, (1935), p. 525; see American Law Institute, Restatement of the Law of Trusts, Sec. 128.

II.

The Ida M. Douglas Trust, Within the Meaning and Application of the Revenue Acts of 1926 and 1928, Is a Separate Taxable Entity and Its 1927 and 1928 Income Is Taxable to It or to Its Beneficiary and Not to Petitioner as Its Settlor.

Petitioner's position, in brief, is that the trustee of the Ida M. Douglas Trust, Mrs. Douglas, and Petitioner are separate taxpayers under the Revenue Acts, and that Petitioner is not accountable for tax upon that income of the trust accumulated for or paid to Mrs. Douglas. He bases this position upon the facts that the trustee acquired and held legal and equitable title, under the Minnesota statutes, to the trust *res*;[6] that the trust *res* was under the trustee's exclusive possession and control; that this situation was irrevocable by Petitioner and was subject to no interference by him (R. 69, 70); that Mrs. Douglas possessed an interest in the trust *res* which is recognized as her separate property; that the trust provisions of the Revenue Acts taxed the income realized either to the trustee or to the beneficiary; that the income of the trust in 1927 and 1928 was actually received from the trustee by Mrs. Douglas and enjoyed by her; that Petitioner had no right to receive or enjoy that income; that the receipt of that income by Mrs. Douglas was in itself in no sense a satisfaction of any obligation from Petitioner to her.

Provisions of the Revenue Acts:

The Revenue Acts of 1926 and 1928, under which the taxes in question were exacted from Petitioner, define "taxpayer" as "any person subject to a tax imposed by this Act."[7] "Person" is defined to mean "an individual, a trust or estate,

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[7] 1926 Act, Sec. 2 (a) (9); 1928 Act, Sec. 701 (a) (13).

a partnership, or a corporation."[8] "Fiduciary" means "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person."[9] The fiduciary of every trust, the net income of which is over $1,500 or the gross income of which is over $5,000, is required to make an income tax return for the trust, and any fiduciary so required to make a return is subject to all the provisions of law applicable to individuals.[10]

Both Acts provide that gross income includes gains, profits, and income derived from dealings in property, whether real or personal, growing out of the use of or interest in such property, and gains or profits or income derived from any source whatever.[11]

The trust provisions of the Revenue Acts provide that the income taxes imposed upon individuals shall apply to the income of estates or of any kind of property held in trust, including income which is distributed currently by the fiduciary to the beneficiaries and income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated. The tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary.[12] There shall be allowed as a deduction in computing the net income of the estate or trust the amount of its income which is to be distributed currently by the fiduciary to the beneficiaries, and the amount so allowed shall be included in computing the net income of the beneficiaries.[13] Where, in the discretion of the grantor alone or in conjunction with any person not a beneficiary of the trust, the income may be distributed to the grantor or held or

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[8] 1926 Act, Sec. 2 (a) (1); 1928 Act, Sec. 701 (a) (1).
[9] 1926 Act, Sec. 200 (b); 1928 Act, Sec. 701 (a) (5).
[10] 1926 Act, Sec. 225; 1928 Act, Sec. 143.
[11] 1926 Act, Sec. 213 (a); 1928 Act, Sec. 22 (a).
[12] 1926 Act, Sec. 219; 1928 Act, Sec. 161.
[13] 1926 Act, Sec. 219; 1928 Act, Sec. 162.

accumulated for future distribution to him, or where any part of the income is or may be applied to the payment of premiums upon policies of insurance upon the life of the grantor, that income shall be included in the grantor's net income.[14]

It is submitted, therefore, that the Revenue Acts of 1926 and 1928 have specific application to the income of the Douglas trust and tax that income to the fiduciary or to the beneficiary thereof. The effect of the taxing sections in these Acts, although their presence was noted (R. 84), was entirely overlooked by the court below. See Note (1935), 48 Har. Law. Rev. 815, 818.

Application of the Revenue Acts:

1. The trust provisions of the Revenue Acts of 1926 and 1928, *supra*, are definite. The meaning to be given to them and the application to be made of them is clear:

> "Is this the reasonable construction of the language of the act, * * *? The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' *Levy's Lessee vs. McCartee*, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' *Maillard vs. Lawrence*, 16 How. 251, 261, * * *. As was said in *Lynch vs. Alworth-Stephens Co.*, 267 U. S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied

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[14] 1926 Act, Sec. 219 (h); 1928 Act, Sec. 167.

to taxing acts. *DeGanay vs. Lederer,* 250 U. S. 376, 381." *Old Colony R. R. Co. vs. Commissioner of Internal Revenue,* (1932) 284 U. S. 552, 560.

Inasmuch as taxing acts are here involved, the general rule requiring adherence to the letter applies with peculiar strictness in the instant case. *Crooks vs. Harrelson,* (1930) 282 U. S. 55, 61; *Grinnell vs. Commissioner,* (C. C. A. 2, 1934) 70 F. (2) 705, 708, affirmed 294 U. S. 153. These rules of law alone, it is submitted, demand the conclusion that the trust income paid to Mrs. Douglas is not income taxable to Petitioner.

2. In addition, however, the courts in decided cases have recognized the efficacy of the trust sections of the Revenue Acts.

> "• • • the law has seen fit to deal with this abstraction (trusts) for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions." *Anderson vs. Wilson,* (1933) 289 U. S. 20, 27.

It has been held, accordingly, that the settlors of certain trusts may not be taxed on the income thereof even though each trust was created by the settlor for the support of his wife or children.

Schweitzer vs. Commissioner, (C. C. A. 7, 1935) 75 F. (2) 702, Certiorari applied for May 23, 1935.

Commissioner vs. Stokes, (C. C. A. 3, 1935) ... F. (2) ..., (353-A Commerce Clearing House, Par. 9528; Prentice Hall Federal Tax Service, 1935, Par. 1712).

Ferrer vs. Commissioner, (1930) 20 B. T. A. 811.

Blake vs. Commissioner, (1931) 23 B. T. A. 554.

Frank vs. Commissioner, (1933) 27 B. T. A. 1158.

Longyear vs. Commissioner, (1933) 28 B. T. A. 1086, affirmed (C. A. D. C.) 77 F. (2) 116.

Grosvenor vs. Commissioner, (1934) 31 B. T. A. 574, on appeal to Second Circuit.

Dillon vs. Commissioner, (1935) 32 B. T. A. . . ., No. 180.

Similarly, it has been held that a settlor may not be taxed on the income of a trust created by him prior to or after divorce for the benefit of his wife.

Lynch vs. Commissioner, (1931) 23 B. T. A. 435, Petition for Review dismissed (C. C. A. 5, Feb. 2, 1932).

Brooks vs. Commissioner, (1934) 31 B. T. A. 70, on appeal to Second Circuit.

Hyde vs. Commissioner, (1934) 31 B. T. A. 256, on appeal to Second Circuit.

Tuttle vs. Commissioner, (1934) 31 B. T. A. 782, on appeal to Sixth Circuit.

These cases, of course, are directly in point here and clearly indicate the attitude of the Board of Tax Appeals upon the question.

The Bureau of Internal Revenue, itself, for over ten years entertained a like view. *O. D. 1092, 5 C. B. 190 (1921),* overruling *O. D. 399, 2 C. B. 156 (1920),* and in turn revoked by *I. T. 2628, XI-1 C. B. 34 (1932).* During that ten year interval the Revenue Acts of 1924, 1926, and 1928 were enacted and the Revenue Act of 1932 was formulated with nothing in their provisions or in the accompanying Committee Reports to indicate that the rule of *O. D. 1092* was not approved by the Congress. The Revenue Act of 1934, likewise, contains nothing indicating disapproval of that rule, although by the time of its passage the attitude of the United States Board of Tax Appeals upon the point had become established by the *Lynch* Case, *supra.* The Congress could

easily have made effective any existent desire on its part to tax to the settlor the income of a trust such as that here involved by inserting in the Revenue Acts a direct provision to that effect.[15] The absence of such a provision forcefully indicates the lack of any intention on the part of the Congress to tax to the settlor of a trust of the type here involved the income thereof.

3. *Helvering vs. Butterworth*, (1933) 290 U. S. 365, is particularly helpful. That case involved the question whether the distributed income of a testamentary trust created by the decedent for his wife's benefit was an allowable deduction for the fiduciary or whether it was taxable to the trust. This court held it was a proper deduction and noted that the general purpose of the Revenue Act was to tax in some way the entire income of all trust estates. It was said, p. 370:

> "When she makes her election the widow decides to accept the benefits of the will with the accompanying rights and liabilities. In no proper sense does she purchase an annuity. For reasons satisfactory to herself, she expresses a desire to occupy the position of a beneficiary and we think she should be so treated."

No sound reason exists why the beneficiary of the Douglas trust, who had elected to accept the benefits of that trust, should be relieved of a tax on a large annual income or treated with any more solicitude than was Mrs. Butterworth. See *Note (1935), 48 Har. Law Rev. 815, 820.* In both cases what is in fact the beneficiary's capital and separate property produces the type of income specifically recognized by the

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[15]Compare the birth of Section 219 (g) and (h) of the Revenue Act of 1924 (43 Stat. 253, 277) whereby the tax base of the settlor of a trust was specifically enlarged to include the income of revocable trusts, trust income distributed to or held or accumulated for the grantor, and trust income used to pay premiums on policies of insurance on the grantor's life.

trust provisions of the Revenue Acts as actually received by a separate taxable entity and taxable to the one who has the use and enjoyment thereof.

4. Petitioner's position is further fortified by the fact that the income received by Mrs. Douglas under the trust was not alimony. As has been shown, *supra*, pp. 5, 6, the trust agreement between Petitioner and Mrs. Douglas was a *property settlement* which the parties as husband and wife were fully competent to make under the terms of the Minnesota statutes.[1] The Supreme Court of Minnesota has recognized the essential distinction between a division of property and an award of alimony. *Bensel vs. Hall,* (1929) 177 Minn. 178, 181, 225 N. W. 104. By virtue of the divorce statutes,[16] (and Minnesota courts, with respect to divorce, have only those powers expressly delegated by statute, *Ostrander vs. Ostrander,* (1934) 190 Minn. 547, 549, 252 N. W. 449, 450), the court was fully empowered to decree to Mrs. Douglas her separate property, or, if in its estimation that was not sufficient, any portion of Petitioner's property not exceeding in value one-third thereof, or *alimony,* i. e., any portion, not exceeding one-third, of Petitioner's earnings and income. The divorce court, however, obviously operating on the theory that the property settlement theretofore made by the parties sufficiently set over to Mrs. Douglas all her property and all that could properly be allotted to her from Petitioner's property and income, made to her no award or order for alimony. The United States Circuit Court of Appeals for the Eighth Circuit, in finding that the payment of the trust income to Mrs. Douglas was "a method of paying alimony" (R. 87), misconstrued the actual terms of the divorce decree (R. 54, 55) and failed to appreciate the distinction between a

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[16]Mason's Minnesota Statutes of 1927, Sec. 8602.

property settlement and alimony. The divorce decree must be read in the light of *Mason's Minnesota Statutes of 1927*, Sec. 8602, and, when so read, it is clear that there was, in substance, a mere approval of the earlier *division of property*.

Von Trott vs. Von Trott, (1903) 118 Wis. 29, 94 N. W. 798.

Kistler vs. Kistler, (1910) 141 Wis. 491, 124 N. W. 1028.

Steinkopf vs. Steinkopf, (1917) 165 Wis. 224, 161 N. W. 757, 759.

Farmers & Merchants Bank vs. Dondelinger, (1918) 103 Kans. 444, 175 Pac. 109, 110.

Petitioner, after the execution of the agreement of September 12, 1923, was under no further legal or moral obligation to his wife.

III.

THE AUTHORITIES RELIED UPON BY THE COMMISSIONER AND THE COURT BELOW AFFORD NO AID IN THE SOLUTION OF THE PROBLEM.

1. The United States Circuit Court of Appeals for the Eighth Circuit was of the opinion that its conclusion is supported by *Burnet vs. Wells*, (1933) 289 U. S. 670. That case, however, solely concerned the question whether the Congress could *constitutionally* tax to a settlor the income of irrecovable trusts used to pay premiums upon policies of insurance on the settlor's life. The statutes involved were Sections 219 (h) of the Revenue Acts of 1924 and 1926, 43 Stat. 277, 44 Stat. 34. It is submitted that the case at bar concerns primarily not a question of *power* on the part of the Congress but, instead, a question whether the Congress has *in fact* taxed to Petitioner the income of the Ida M. Douglas Trust under Sections 2, 213, and 219 of the Revenue Act of

1926 and under Sections 701, 22, 161, and 162 of the Revenue Act of 1928. The distinction has been well expressed by the United States Board of Tax Appeals:

> "(In *Willcuts vs. Douglas*) the court apparently failed to appreciate the fact that in the *Wells* case there was specific statutory authority for including in the income of the grantor the amounts applicable to the payment of the insurance premiums." *Grosvenor vs. Commissioner,* (1934) 31 B. T. A. 574, 576.

See also *Note (1935), 30 Ill. Law Rev. 249, 251, 252;* See *Comment (1935), 44 Yale Law Journal, 1409, 1415;* See *Note (1935), 48 Har. Law Rev. 815, 818;* See *Helvering vs. Grinnell,* (1935) 294 U. S. 153.

2. *Gould vs. Gould,* (1917) 245 U. S. 151, does not stand in the way of the conclusion urged by Petitioner for the reasons that it concerned strict alimony payments, the separation was one only from bed and board and was not an absolute divorce, and the case did not involve an irrevocable trust over which no control was exercised by the husband.

3. *Appleby vs. Commissioner,* (1925) 2 B. T. A. 1061; *Welch vs. Commissioner,* (1928) 12 B. T. A. 800, and *Turner vs. Commissioner,* (1933) 28 B. T. A. 91, affirmed (C. C. A. 2), 71 F. (2) 1018, are all distinguishable because the trust in each of these cases was not one fully beyond the settlor's control, the ownership of the trust *res* had not departed from him, and the trust was established primarily only to *secure* specified payments to be made from other sources to the settlor's wife.

Spencer vs. Commissioner, (1930) 20 B. T. A. 58, is distinguishable because the case did not precisely concern the taxability of trust income to the settlor. This fact has been held by the Board sufficient to make the case of no value

as an authority where the very different question of the case at bar is in issue. *Brooks vs. Commissioner,* (1934) 31 B. T. A. 70, 74, on appeal to Second Circuit; see *Savage vs. Commissioner,* (1934) 31 B. T. A. 633, 636, on appeal to Third Circuit. Further, the decision is based in part upon *Warner vs. Walsh,* (C. C. A. 2, 1926) 15 F. (2) 367, and *United States vs. Bolster,* (C. C. A. 1, 1928) 26 F. (2) 760, both of which cases were definitely disapproved by this court in *Helvering vs. Butterworth,* (1933) 290 U. S. 365, 369.

4. Because the receipt by Mrs. Douglas of income from the trust was in no way the satisfaction of an obligation owing Mrs. Douglas by Petitioner, those cases embracing the doctrine of constructive receipt of income and therefore taxing to a taxpayer the payment by another of an obligation owing him are definitely *not* in point. See *Note (1935), 30 Ill. Law Rev. 249, 252.* Cases of this type are *Old Colony Trust Company vs. Commissioner,* (1929) 279 U. S. 716, 729; *United States vs. Boston & Maine Railroad,* (1929) 279 U. S. 732; *United States vs. Mahoning Coal R. R. Co.,* (C. C. A. 6, 1931) 51 F. (2) 208, certiorari denied 285 U. S. 559. In each of these, as distinguished from the instant case, the payor was under a definite legal obligation to the taxpayer and he had the unqualified right to demand possession of and dominion over the income held to be his income. Further, not one of the cases concerned trust income, but, instead, concerned income which, if not taxed to the obligor, would have escaped taxation because the payments were deductible to the payor.

CONCLUSION.

It is respectfully submitted, therefore, that the Ida M. Douglas Trust was an effective, valid, and irrevocable trust; that its creation constituted a property settlement between Petitioner and Mrs. Douglas; that the income of the trust paid to the beneficiary in 1927 and 1928 was not income taxable to Petitioner. For these reasons, Petitioner prays that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, reversing the judgment of the United States District Court for the District of Minnesota, be itself reversed.

Respectfully submitted,

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APPENDIX A.

Revenue Act of 1926, 44 Stat. 9, 10, 23, 32, 33, 34, provides in part as follows:

Sec. 2 (a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * * * * * * *

(9) The term "taxpayer" means any person subject to a tax imposed by this Act.

* * * * * * * * * *

Sec. 200 (b) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

* * * * * * * * * *

Sec. 212 (a) In the case of an individual, the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

* * * * * * * * *

Sec. 213. * * * (a) The term "gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section

212, any such amounts are to be properly accounted for as of a different period.

Sec. 219 (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *;

* * * * * * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * * * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries * * *, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable

year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

* * * * * * * * *

(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor.

The corresponding sections (701, 21, 22 (a), 161, 162 (b), 167) of the Revenue Act of 1928, 45 Stat. 791, 878, 797, 838, 840, are substantially identical.

APPENDIX B.

Mason's Minnesota Statutes of 1927:

8090. Express trusts may be created for any of the following purposes:

* * * * * * * * *

(5). To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust; and the district courts of the state shall, upon petition and hearing have power to appoint a trustee for the purpose herein set forth, requiring such trustee to give such bond for the faithful execution of such express trust

as to the court may seem right and proper; and express trusts created under the provisions of this paragraph shall be administered under the direction of the court.

(6). For the beneficial interests of any person or persons, whether such trust embraces real or personal property or both, when the trust is fully expressed and clearly defined on the face of the instrument creating it: Provided, that the trust shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of them, and that the free alienation of the legal estate by the trustee is not suspended for a period exceeding the limit prescribed in chapter 59.

8095. Every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustee, in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created shall take no estate or interest in the lands but may enforce the performance of the trust in equity.

8602. Upon a divorce for any cause except that of adultery committed by the wife, if the estate and property restored or awarded to her is insufficient for the suitable support of herself and such children of the marriage as shall be committed to her care and custody, or if there is no such estate and property, the court may further order and decree to her such part of the personal and real estate of the husband, not exceeding in value one-third thereof, as it deems just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case. The court may also, in the cases provided for in this section, decree to the wife such alimony out of the estate, earnings, and income of the husband as it may deem just and reasonable, having regard to the ability

of the husband, the character and situation of the parties, and other circumstances of the case, and may by its decree make the same a specific lien upon any specified parcels of his real estate, or authorize its enforcement by execution against his property, real and personal; but the aggregate award and allowance made to the wife from the estate of the husband under this section shall not in any case exceed in present value one-third of the personal estate, earnings, and income of the husband, and one-third in value of his real estate.

8607. Whenever a decree of divorce from the bonds of matrimony is granted in this state, such decree shall completely dissolve the marriage contract as to both parties. And in all actions for a divorce brought by a woman, if a divorce is granted, the court may change the name of such woman, who shall thereafter be known by such name as the court designates in its decree.